IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARK NEWBY, ET AL.,

Plaintiffs,

VS.

ENRON CORPORATION, ET AL.,

Defendants

CIVIL ACTION NO: H-01-3624
AND CONSOLIDATED CASES

MEMORANDUM AND ORDER

Pending before the Court are Defendant Kenneth L. Lay's Motion to Enjoin Fleming & Associates, L.L.P. from Seeking *Ex Parte* Relief in State Court and for Sanctions, and Supporting Brief (Instrument No 276) and Jeffrey K. Skilling's Memorandum of Law in Support of Motion for Emergency Injunctive Relief Under the All Writs Act and Imposition of Sanctions on Fleming & Associates (Instrument No. 280). There are also pleadings from Andrew Fastow and David Duncan joining in the requests for relief sought by Messrs. Lay and Skilling.

Lay requests the Court to enjoin Fleming & Associates, L.L. P. from applying for any more injunctive relief in state court in derogation of this Court's jurisdiction without providing this Court and Lay at least three full business days' notice and to award Lay his attorneys' fees incurred in preparing and prosecuting this motion as a sanction for Fleming's prior vexatious conduct.

Skilling requests the Court to go further. He asks the Court to issue an order that mandates Fleming to dissolve the Temporary Restraining Order obtained *ex parte* on February 7, 2002 in *David Jose, et al. v. Arthur Anderson, L.L.P., et al.* in the 57th Judicial District Court of Bexar County, Cause No. 2002-CI-01906, enjoins Fleming from filing any new Enron-related

actions without leave of this Court, and grants defense counsel fees and costs reasonably incurred in the pursuit of this motion and hearing.

The Court held an expedited hearing on both motions on February 14, 2002.

The *Jose* case represents the fifth in a series of lawsuits filed by Fleming & Associates, L.L.P. on behalf of shareholders of Enron Corporation who allege that the defendants defrauded them. The first was filed in Harris County, Texas on November 7, 2001 by plaintiffs Fred A. Rosen and Marian Rosen (*Rosen* litigation). On November 13, 2001 the second suit was filed in the United States District Court, Southern District of Texas by John and Peggy Odam and four other plaintiffs.(*Odam* litigation) This suit alleged federal securities fraud claims against Enron and various Enron officers and directors. After Enron filed a petition in bankruptcy on December 2, 2001 Fleming filed a voluntary non-suit of all the defendants in *Odam,* except Andersen, and non-suited Enron in the *Rosen* litigation. On December 12, 2001 the *Odam* litigation was consolidated with 45 other Enron-related federal court actions in the Southern District of Texas, under the caption *Newby v. Enron Corp., et al.* (*Newby* litigation). On January 24, 2002 the third Fleming Enron suit was filed on behalf of 11 plaintiffs in state court in Washington County, the *Bullock* litigation. This case has been removed to the United States District Court for the Western District of Texas. It sought and received an ex parte TRO against Andersen that was virtually identical to the relief granted by this Court the day before in the *Newby* case. The TRO relief was also granted against defendant Lay. On January 29, 2002 Fleming filed its fourth Enron-related lawsuit in state court in Brazos County, Texas, the *Ahlich* litigation. This suit was brought on behalf of 45 plaintiffs against 37 defendants. It also sought an *ex parte* TRO against Andersen and Lay. The *Ahlich* litigation was removed to the United States District Court, Southern District of Texas. All of these lawsuits make

essentially the same factual allegations against Andersen and approximately 37 Enron officers and directors.

G. Sean Jez of the Fleming firm represented to the Court at a hearing on January 30, 2002 that the firm represented over 750 individuals with filed or to be filed cases against these defendants. To date suits have been filed for approximately 80 of these individuals in different Texas counties and in this federal district court.

The Securities Litigation Uniform Standards Act (SLUSA) provides that certain securities cases are preempted by federal law if they meet the following requirements:

1. The action is a "covered class action" under SLUSA;

2. The action purports to be based upon state law;

3. The action involves a "covered security" under SLUSA;

4. The defendant is alleged to have misrepresented or omitted a material fact; and

5. The alleged misrepresentation or omission was made "in connection with" the purchase or sale of the covered security.

15 U.S.C. Sec. 77p(b), 78bb(f)(1-2).

Under SLUSA "a covered class action" is defined as:

> (i) any single lawsuit in which –
>
> (I) damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class . . .predominate . . .;or
>
> (II) one or more named parties seek to recover damages on a representative basis . . . and questions of law or fact common to those persons or members of the prospective class predominate . . .; or
>
> (ii) any group of lawsuits filed in or pending in the same court and involving common questions of law or fact, in which

– (I) damages are sought on behalf of more than 50 persons and

(II) the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purposes.

15 U.S.C. Sec 77p(f)(2)(A).

Jez is careful to point out that his suits are not denominated class actions and they do not aggregate 50 or more plaintiffs in any one suit. The inevitable inference is that he thereby hopes to avoid the prohibitions of SLUSA. He readily admits that SLUSA would apply to his suits were they denominated class actions or if he aggregated 50 or more plaintiffs, but adamantly maintains that because they do neither, they are not covered by SLUSA. Thus he concludes that because his cases are not "covered class actions" this Court has no authority to enjoin his lawsuits.

SLUSA was passed in 1998 in order to prevent plaintiffs from evading the procedural safeguards of the Private Securities Litigation Reform Act of 1995, 15 U.S.C. Secs. 77Z-1, 78u (PSLRA) by asserting federal securities fraud claims under the guise of state law. In *Lander v. Hartford Life & Annuity Ins. Co.*, 251 F. 3d 101, 108 (2d Cir. 2001) the Court held that SLUSA "closed this loophole in PSLRA" by "making federal court the exclusive venue for class actions alleging fraud in the sale of certain covered securities and by mandating that such class actions be governed exclusively by federal law."

Lay and Skilling argue that Fleming should not be allowed, by artful pleading, to circumvent the terms of SLUSA. Clearly SLUSA was enacted to prevent just such gamesmanship, and it is only by Fleming's careful avoidance of the term "class action" and decision to aggregate less than 50 plaintiffs in each of his lawsuits that he does not fit the terms of the statute precisely. Defendants ask the Court to take into consideration that the Fleming firm has acknowledged that it represents more than 750 plaintiffs and has as much as acknowledged that it will continue to file

lawsuits on behalf of these plaintiffs, *seriatim*. throughout the State of Texas. In *Prager v. Knight/Trimark Group, Inc.*, 124 F. Supp. 2d 229, 233 (D.N.J. 2000) the Court described Congress's intention as one "to completely preempt state securities cases alleging fraud or manipulation." *See also, Haney v. Pacific Telesis Group,* No. CV0078AHMMANX, 2000 WL 33400194, at *20 (Sept. 19, 2000, C.D. Cal.) This being the case, Lay and Skilling argue that it is irrelevant what label plaintiff attaches to his claim. The focus should be on the substance of the claim, not on the plaintiff's characterization of it." *Denton v. H&R Block Fin. Advs. Inc.*, No. 01 C 4185, 2001 WL 1183292, at *3 (N.D. Ill., Oct. 4, 2001). Each of the five lawsuits recites essentially the same facts giving rise to essentially the same claims against essentially the same defendants.

Lay and Skilling do not rely entirely on SLUSA for their request for an injunction. They also rely upon the All Writs Act, 28 U.S.C. Sec. 1651 and the exceptions to the Anti-Injunction Act, 28 U.S.C. Sec. 2283. The All Writs Act provides "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." The Anti-Injunction Act permits federal courts to issue an injunction to stay a state court proceeding "as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." The All Writs Act grants federal courts broad authority to issue an injunction when "necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case." *Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers,* 398 U.S. 281, 295 (1970). Federal Courts have often invoked the All Writs Act when the federal action involves complex, multi-district

litigation[1] and the parallel state action would derogate the federal court's jurisdiction. *In re Corrugated Container Antitrust Litig.*, 659 F.2d 1332, 1334-4 (5th Cir. 1981), *cert denied*, 456 U.S. 936 (1982), *Carlough v. American Products, Inc.*, 10 F3d 189, 197 (3rd Cir. 1993), and *In re Baldwin-United Corp.*, 770 F.2d 328, 336 (2d Cir. 1985).

Under the PSLRA the federal securities class action will be subject to various procedural safeguards that Congress enacted to protect against frivolous filings, such as selection of lead plaintiff and lead counsel and the automatic discovery stay. 15 U.S.C. Secs. 77z-l, 78u. These safeguards, mandated by Congress, necessarily result in the federal putative class action proceeding more slowly than any individual parallel state proceeding would. The existence of these individual claims with their own schedules and discovery would interfere with this Court's ability to manage effectively the litigation before it. The Seventh Circuit has held that if the plaintiff's success in a parallel state court action "would make a nullity of the district court's ruling, and render ineffective its efforts to effectively manage the complex litigation at hand, injunctive relief is proper." *Winkler v. Eli Lilly & Co.*, 101 F3d 1196, 1202 (7th Cir. 1997). The *Winkler* Court went on to say that "Litigants who engage in forum-shopping, or otherwise take advantage of our dual court system for the specific purpose of evading the authority of a federal court, have the potential 'to seriously impair the federal court's flexibility and authority to decide that case.'" *Id.* At 1203 (quoting *Atlantic Coast Line RR*, 398 U.S. at 295). *Winkler's* words fit the instant situation.

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[1]Although this case has not yet been formally declared "multi-district" by the MDL Panel, there is pending a motion before the Panel, and substantially similar lawsuits have been filed in various federal district courts in Texas and other states. The cases filed and consolidated in the Southern District of Texas number over seventy.

The Court is also entitled to protect its judgments and orders by enjoining state court proceedings. *Sperry Rand Corp. v. Rothlein*, 288 F. 2d 245, 248 (2nd Cir. 1961). This Court has issued several Orders and Opinions that warrant protection from the Bexar County *Jose* action and other actions that may be filed seeking similar relief. On January 8, 2002 Judge Rosenthal issued a Memorandum Opinion and Order that denied pre-judgment limitations on the assets of the defendants because there was insufficient evidence to support such a remedy.[2] This Court has already issued an Order prohibiting Arthur Andersen from destroying any additional documentary evidence. To the extent the TRO obtained by Fleming in the Jose case is inconsistent with this Court's Order, an injunction protecting that earlier Order is justified under the All Writs Act.

The All Writs Act and its inherent powers give this Court the authority to enjoin plaintiffs from filing state court actions in order to "preserve the court's ability to effectively rule on matters presently before it, to order meaningful relief with respect to motions pending before it, and to prevent abuse of the justice system." *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324, 1375 (S.D. Tex. 1995) (Lake, J.) See also, *Harris v. Wells,* 764 F. Supp. 743 (D. Conn 1991). Moreover, the Anti Injunction Act does not curtail the Court's power to limit the commencement of future state court litigation. *Delgado*, 890 F. Supp. At 1374; *Dombrowski v. Pfister*, 380 U.S. 479, 485 n.2 (1965); *United Steelworkers of America (AFL-CIO) v. Bagwell*, 383 F. 2d 492, 495 (4th Cir. 1967).

The harassing actions of Fleming's law firm have necessitated the waste of substantial defense resources addressing their duplicative and uncalled for TRO's. It is now abundantly clear, contrary to the inferences Jez wished the court to draw from his representations on January 30, 2002,

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[2]Jez disputes the Lay and Skilling characterization of his TRO as a "freeze" on their assets, but regardless of how the TRO in the *Jose* case is characterized, it does operate as a limitation on the defendants' ability to deal with their assets.

that in the absence of an injunction prohibiting Fleming from filing new actions and seeking emergency relief, Fleming will proceed on a county-by-county basis through the State of Texas filing actions and seeking the same emergency injunctive relief undertaken in the *Bullock, Ahlich*, and *Jose* cases. Such behavior underscores its desire to circumvent the orders and procedures established by this Court and threatens to disrupt the orderly resolution of the consolidated *Newby* actions. Such a circumstance would constitute irreparable harm to the defendants for which there is no adequate remedy at law. *See Bruce v. Martin*, 680 F. Supp. 616, 622 (S.D.N.Y. 1988). The Court finds that it has the authority from the All Writs Act, the Anti-Injunction Statute, and its inherent authority, in the spirit of SLUSA and PSLRA, to grant the following relief.

It is hereby ORDERED, ADJUDGED, and DECREED that Fleming & Associates, L.L.P., be, and is hereby, ordered to dissolve the Temporary Restraining Order obtained February 7, 2002 in *David Jose, et al. v. Arthur Anderson, L.L.P., et al.* in the 57th Judicial District Court of Bexar County, Cause No. 2002-CI-01906.

It is further ORDERED, ADJUDGED, and DECREED Fleming & Associates, L.L.P., be and is hereby enjoined from filing any new Enron-related actions without leave of this Court;

This injunction shall be binding upon all attorneys who are partners of or associated with Fleming & Associates, L.L.P., and any other lawyer or law firm acting under its direction, and upon those persons in active concert or participation who receive actual notice of this order by personal service or otherwise.

The issues of sanctions and attorneys fees remain under advisement.

Signed at Houston, Texas, this 15th day of February, 2002, at 5:55 o'clock p.m.

MELINDA HARMON
UNITED STATES DISTRICT JUDGE